UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
ATLANTA BRANCH OFFICE

GFC CRANE CONSULTANTS, INC.

and

Cases 12–CA–21302
12–CA–21321
12–CA–21496
12–CA–21537

DISTRICT NO. 1-PACIFIC COAST DISTRICT, MARINE ENGINEERS BENEFICIAL ASSOCIATION, AFL-CIO

Susy Kucera, Esq., for the General Counsel.
Sheldon M. Kline, Thomas K. Wotring, and *Justin Sher, Esqs.*, for the Respondent.
Richard J. Hirn, Esq., for the Charging Party.

SUPPLEMENTAL DECISION

GEORGE CARSON II, Administrative Law Judge. This case was heard by Administrative Law Judge Pargen Robertson on December 10 through 14, 2001, and he issued his Decision on April 4, 2002. On September 30, 2006, the Board, citing its decisions in *Oakwood Healthcare, Inc.*, 348 NLRB No. 37 (2006), *Croft Metals, Inc.*, 348 NLRB No. 38 (2006), and *Golden Crest Healthcare Center*, 348 NLRB No. 39 (2006), remanded this case, in which the supervisory status of port engineers was an issue, "for further consideration in light of … [those decisions] including allowing the parties to file briefs on the issue and, if warranted, reopening the record to obtain evidence relevant to deciding the case under … [those decisions]." *GFC Crane Consultants, Inc.*, 348 NLRB No. 51 (2006). The Board directed that this case be assigned to another administrative law judge if Judge Robertson, who has retired from the Agency, was not available. It having been determined that Judge Robertson was not available, Associate Chief Administrative Law Judge William N. Cates assigned the case to me by Order dated November 22, 2006.

In a conference call with all parties on December 4, 2006, Counsel for the General Counsel and Counsel for the Charging Party stated their position that the record need not be reopened. Counsel for the Respondent stated his desire to present unspecified supplemental evidence. On December 22, 2006, I issued an Order setting the date for receipt of briefs for January 26, 2007, and inviting any party who desired to reopen the record to file a motion describing with particularity the evidence to be adduced and specifying in what respect the record was deficient. By letter dated January 3, 2007, Counsel for the Respondent advised that he would not file a motion to reopen the record. I have reviewed the record made before Judge Robertson. Reopening the record has not been requested and is not warranted.

On the entire record, the above cited Board decisions, and after considering the briefs filed by all parties, I reaffirm the decision made by Judge Robertson.

I. The Board Decisions

In *Croft Metals, Inc.*, supra, the Board stated that, in *Oakwood Healthcare, Inc.*, supra, it had "refined the analysis to be applied in assessing supervisor status" and, with citation to the

applicable portions of the *Oakwood Healthcare, Inc.*, decision, summarized the definitions for the terms "assign," "responsibly to direct," and "independent judgment" as follows:

> The authority to "assign" refers to "the act of designating an employee to a place (such as a location, department, or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant over-all duties, i.e., tasks, to an employee. … In sum, to 'assign' for purposes of Section 2(11) refers to the … designation of significant overall duties to an employee, not to the … ad hoc instruction that the employee perform a discrete task." Id. slip op. at 4.
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> The authority "responsibly to direct" is "not limited to department heads," but instead arises "[i]f a person on the shop floor has 'men under him,' and if that person decides 'what job shall be undertaken next or who shall do it,' … provided that the direction is both 'responsible' … and carried out with independent judgment." Id. slip op. at 6. "[F]or direction to be 'responsible,' the person performing the oversight must be accountable for the performance of the task by the other, such that some adverse consequence may befall the one providing the oversight if the tasks performed are not performed properly." Id. slip op. at 7. "Thus, to establish accountability for purposes of responsible direction, it must be shown that the employer delegated to the putative supervisor the authority to direct the work and the authority to take corrective action, if necessary. It also must be shown that there is a prospect of adverse consequences for the putative supervisor if he/she does not take these steps." Id. slip op. at 7.
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> "[T]o exercise 'independent judgment,' an individual must at minimum act, or effectively recommend action, free of the control of others and form an opinion or evaluation by discerning and comparing data." Id. at 8. "[A] judgment is not independent if it is dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority, or in the provisions of a collective-bargaining agreement." Id. slip op. at 8. "On the other hand, the mere existence of company policies does not eliminate independent judgment from decision-making if the policies allow for discretionary choices." Id. slip op. at 8 (citations omitted). Explaining the definition of independent judgment in relation to the authority to assign, the Board stated that "[t]he authority to effect an assignment … must be independent [free of the control of others], it must involve a judgment [forming an opinion or evaluation by discerning and comparing data], and the judgment must involve a degree of discretion that rises above the 'routine or clerical.'" Id. slip op. at 8 (citations omitted).

II. Facts and Analysis

The Respondent, pursuant to a contract with Broward County, Florida, provides maintenance services upon cranes used to unload containerized cargo from ships at Port Everglades. The initial decision herein discusses the testimony given at the hearing and need not be repeated. As set out in the initial decision, it is uncontested that Respondent's President Gerald Charlton, the Senior Port Engineer, and the Supervisory Port Engineer are statutory supervisors. The port engineers were assigned to shifts, called watches, with one or two crane maintenance electricians, referred to as CMEs. The teams of a port engineer and CMEs were assigned specific cranes for which they had two missions, "scheduled maintenance and cargo watch." *GFC Crane Consultants, Inc.*, supra JD slip op. at 2.

Judge Robertson found, contrary to the Respondent's arguments, that port engineers "did not have authority to promote, evaluate, or discipline … or to effectively recommend such action" or that they "responsibly directed" employees. The decision concludes that port

engineers did not have "authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action." Id. JD slip op. at 4. Consistent with the Board's remand, I address only the issues of assignment, responsible direction, and independent judgment as refined by the Board in *Oakwood Healthcare, Inc.*

The relevant time for the inquiry relating to the supervisory status of port engineers is the year 2000. The Respondent's operations evolved during the period between 1995 and 2000, and documents were issued throughout that time period that prescribed the procedures that port engineers were to follow. Prior to 1997, there had been no preoperational checklist regarding the status of cranes being made ready for service. On January 28, 1997, Dale Hoover, who was Senior Port Engineer at that time, issued a preoperational checklist. In early 1998, port engineer Tim Herring had understood that he had the discretion to call other personnel to assist with a problem, and did so. On February 10, 1998, Senior Port Engineer Hoover issued a warning to Herring in which he informed him that he did "not now, or have ever have had, authority to call out other personnel to assist you. That authority is mine and Mr. Charlton's alone. It has been standing policy to call myself when additional personnel are required and when there is an operational decision that needs to be made." Mark Aloisio became Supervisory Port Engineer in September of 1999. Following his appointment, the Respondent reduced manning on nights and weekends when no cargo was being unloaded and the cranes were not in operation and instituted a "block maintenance program" prescribing the frequency with which specific maintenance items were to be performed.

During a cargo watch, the assigned team would, using the preoperational checklist, ensure that the crane was operating properly and then stand by to make necessary repairs if the crane broke down. Written instructions directed the port engineer to contact the Senior Port Engineer or Supervisory Port Engineer if a crane was out of operation for more than 30 minutes. Port engineer Rudy Veiga testified that "eventually, it became 15 minutes," and Supervisory Port Engineer Aloisio confirmed that "towards the end," i.e. prior to the discharge of the port engineers, "it was the 15 minute mark." As already noted, on February 10, 1998, port engineer Herring was warned and informed by the Senor Port Engineer that it was "standing policy to call myself … when there is an operational decision that needs to be made." Even though acknowledged supervisors were not present on site at night or on weekends, "management … [was] available after hours," and port engineers contacted them in compliance with the Respondent's policies. See *Golden Crest Healthcare Center*, supra at fn. 10.

Maintenance work consisted of scheduled maintenance and repairs, including tasks such as greasing cable wires, changing oil, "anything that needed to be done" to keep the cranes in good working order. Scheduled maintenance was performed monthly or less often depending upon the maintenance item as set out in the "block maintenance program." Regular inspections of the cranes disclosed items that needed attention and were noted on a list given to the Senior Port Engineer or Supervisory Port Engineer who approved what work was to be performed. A list of tasks to be performed was approved by the Senior Port Engineer or Supervisory Port Engineer each week and given to the port engineers. Initially the lists were handwritten as reflected by various exhibits. After institution of the "block maintenance program," the tasks were posted on a board and checked off as they were completed.

Port engineers, as found in the initial decision, did the same work as the CMEs. To quote port engineer Tim Herring, who estimated that he spent from 10 to 15 percent cent of his time filling out paperwork, "[I]t was all routine work." "I got out there and worked with the electricians [CMEs], whatever the job happened to be." Port engineer Rudy Veiga, who

physically worked from 65 to 70 per cent of the time, explained that the work performed by the team was not "divided between us [the port engineers] and the CMEs. We would do it together." He pointed out that it was "routine, … these are all repetitive type jobs." When, upon seeing on the list that wire ropes needed to be greased, Viega would go to the break room and say, "[C]ome on guys, we've got to grease the wire ropes." Lead CME Paul Titus, a witness for the Respondent, admitted that Veiga spent at least 50 per cent of his time physically working. Port engineer Vincent Dobbin confirmed that "[w]e would do routine tasks all the time."

Although the port engineer would prioritize the tasks to be performed, lead CME Titus confirmed that the CMEs would make suggestions "constantly." This collegial working relationship among team members was confirmed by President Charlton who acknowledged that the port engineers and CMEs would "work together as a team." Port engineer Scott Zinsius noted that, if a job were going too slowly, he might "join in on the job," but that it could "go the other way," giving the example of a CME taking over an oil change on a diesel engine from him. CME Andrew Balash, after finishing a specified task, would "just go continue" performing the "other things on the list." The decision regarding the priority of tasks to be performed could also be a function of time. As port engineer Jody Thomas pointed out, the team "would not start an 8 hour job if there were only 2 hours left on the shift."

With regard to authority to assign, there is no evidence that the port engineers designated CMEs to a place other than their assigned crane, their assigned shift, or the duties associated with their position as CMEs. Any shift change had to be approved by the Senior Port Engineer or Supervisory Port Engineer, as did all overtime except when a cargo watch continued beyond the end of a normal shift, in which case standing instructions required the employees to remain until the ship was unloaded and the cranes ceased operating.

With regard to the authority responsibly to direct, the Board requires both direction and accountability. With regard to direction, "it must be shown that the employer delegated to the putative supervisor the authority to direct the work and the authority to take corrective action, if necessary." Direction is established by showing that the putative supervisor determines "what job shall be undertaken next or who shall do it." The authority to take corrective action obviously falls below the threshold of formal discipline, since the authority to discipline, assuming independent judgment in that regard, would, standing alone, establish supervisory authority. Thus, from the list that he received from his superiors, a port engineer's deciding the order in which he and the CMEs working with him were going to undertake the tasks, explaining the correct manner in which to perform a task, and giving verbal reminders regarding safety rules or established procedures would fulfill the first requirement of responsible direction. The foregoing interpretation is consistent with the holding in *Croft Metals, Inc.*, supra slip op. 6, in which the Board found that moving employees to different tasks, correcting improper performance, and making decisions about the order in which work was to be performed, constituted "direction."

The second requirement, and an essential requirement of responsible direction, is accountability. In *Golden Crest Healthcare Center*, supra at fn. 11, the Board pointed out that a finding of responsible direction requires both evidence of direction and accountability, "when there is no showing of 'direction,' the Board need not reach the issue of "accountability," just as when there is no showing of 'accountably,' the Board need not reach the issue of 'direction.'"

There is no evidence that port engineers were held accountable for their actions in directing CMEs. Although port engineers were disciplined for their conduct, as in *Golden Crest Healthcare Center*, there is no evidence that any port engineer "has experienced any material consequences to … [his] terms and conditions of employment, either positive or negative, as a result of … [his] performance in directing … [CMEs]." Id. slip op. at 5.

The Respondent, in its brief, citing three instances of discipline to port engineers, argues that they were held responsible for the work of the CMEs. The documentary evidence does not support the argument. The port engineers were cited for their own derelictions. Port engineer Mike Galka was discharged following a crane collision. Contrary to the assertion that "management held the Port Engineer accountable for the CME's deficient work," the Respondent's written response dated January 19, 2001, to a grievance filed by the Union refers to Galka's placing "the blame on one of the electricians is not only disingenuous but also cowardly. In the end, there is no escaping the fact that he deliberately bypassed the collision avoidance system which was the direct and proximate cause of the accident." Port engineer Peter Leahy was cited on August 29, 2000, when it was discovered that a gantry drive motor had been improperly wired. A memo from the Senior Port Engineer notes that he should have made sure the job was done right but did not do so because he "did not gantry full stick." A letter to Leahy from President Charlton dated August 30, 2000, regarding this incident states that he did not "fully test the gantry motor." Although claiming that the Respondent held port engineer Scott Zinsius responsible when a crane collided with a tanker truck, "even though he was not operating the crane," the letter to Zinsius dated December 29, 1998, points out that he was the responsible engineer on watch and that it was his "responsibility to notify the [Broward County] Port Engineer … [and] Senior Port Engineer" as stated in a memorandum and that he, Zinsius, should make "no mistake … regarding notification to authorities reporting damage."

With regard to independent judgment, even if a putative supervisor is found "responsibly to direct" because he or she both directs and is held accountable, there is no finding of supervisory status if that responsible direction is not exercised with independent judgment. Independent judgment is action that is "free of the control of others." Thus, for responsible direction to be independent, it cannot be "dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority, or in the provisions of a collective-bargaining agreement." *Oakwood Healthcare, Inc.*, supra, slip op. at 8. In *Croft Metals*, although finding that the lead persons therein both directed employees and were "held accountable for the job performance of the employees assigned to them," the Board determined that the lead persons were not supervisors because the employees "generally perform the same job or repetitive tasks on a regular basis and, once trained in their positions, require minimal guidance." Directions were "routine." Id. slip op. at 6.

The port engineers in this case did not exercise independent judgment. Even if the discipline noted above were to be construed as somehow holding port engineers responsible for actions of the CMEs, those documents refute any claim of independent judgment since they show that the port engineers did not follow proper procedures. The lists that determined the maintenance work that teams performed were approved by the Senior Port Engineer or Supervisory Port Engineer. The employees worked together as a team, and the work they performed was routine and repetitive. On cargo watches, a preoperational checklist determined whether a crane was ready for use. If a crane broke down, the team of a port engineer and CMEs would immediately try to get the crane operational, but the port engineer was required to contact the Senior Port Engineer or Supervisory Port Engineer when down time exceeded 30, later reduced to 15, minutes. Rather than exercising independent judgment, port engineers were to contact their superiors "when there is an operational decision that needs to be made."

The Respondent argues that port engineers "decided, free from the control of management, whether … [a] malfunctioning crane should be fixed or replaced." The foregoing is inconsistent with both the required notification to the Senior Port Engineer or Supervisory Port Engineer when down time occurred as well as the standing policy to call "when there is an operational decision that needs to be made." It is also contrary to the finding in the initial

decision that the "port engineer simply notified Port Everglades and the supervisory port engineer of the problem." *GFC Crane Consultants, Inc.*, supra, JD slip op. at 6. Furthermore, as pointed out in the brief of the Charging Party, citing *Chevron U.S.A.*, 309 NLRB 59, 68 (1992), "[i]t is the authority over employees, not the control of equipment, that is relevant" in determining supervisory status.

In *Oakwood Healthcare, Inc.*, supra, the Board noted that "for an individual 'responsibly to direct' … with 'independent judgment,' that individual would need to exercise 'significant discretion and judgment in directing' others." Id. at fn. 38. The foregoing is consistent with the Board's holding that "[p]roof of independent judgment … entails the submission of concrete evidence showing how assignment decisions are made. The assignment of tasks in accordance with an Employer's set practice, pattern or parameters, or based on such obvious factors as whether an employee's workload is light, does not require a sufficient exercise of independent judgment to satisfy the statutory definition." *Franklin Home Health Agency*, 337 NLRB 826, 830 (2002), citing *Express Messenger Systems*, 301 NLRB 651, 654 (1991) and *Bay Area-Los Angeles Express*, 275 NLRB 1063, 1075 (1985). In this case, as in *Croft Metals Inc.*, supra, slip op at 6, any directions given by port engineers would not rise above the routine or clerical that the Act specifically states do not confer supervisory status. As recognized by the Supreme Court, in *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 713 (2000). "[m]any nominally supervisory functions may be performed without the 'exercis[e of] such a degree of … judgment or discretion … as would warrant a finding' of supervisory status under the Act. *Weyerhaeuser Timber Co.*, 85 N.L.R.B. 1170, 1173 (1949)."

The burden of establishing supervisory status is upon the party asserting that status. The Respondent has not met that burden. The evidence in this case does not establish that port engineers assign, responsibly direct, or exercise independent judgment.

III. Conclusions of Law

Having considered the record in view of the "refined … analysis to be applied in assessing supervisor status" prescribed in *Oakwood Healthcare, Inc.*, and the briefs filed by all parties, I find that the port engineers are not supervisors as defined in the Act. Accordingly, I issue the following recommended[1]

ORDER

The Respondent shall comply with the recommended Order set out in the Decision issued by Judge Robertson on April 4, 2002.

Dated, Washington, D.C. , February 9, 2007.

George Carson II
Administrative Law Judge

[1] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.